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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 431

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ATLANTA METALLIC CASKET COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 14, 1949, which denied the petition of the Board for enforcement of its order against Atlanta Metallic Casket Company.

OPINIONS BELOW

The opinion of the court of appeals (R. 80) is reported at 173 F. 2d 758. The findings of fact, conclusions of law and order of the Board (R. 33-69) are reported at 75 N. L. R. B. 208.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1949 (R. 81). The Board's petition for rehearing (R. 82-91) was denied on May 30, 1949 (R. 93). On August 26, 1949, by order of the Chief Justice, the time within which the National Labor Relations Board might file a petition for a writ of certiorari was extended to and including October 28, 1949 (R. 94). The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether there is substantial evidence to support the Board's findings that the Company discharged one of its employees because of his union activities, in violation of Section 8 (3) of the Act, and otherwise interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them under Section 7 of the Act, in violation of Section 8 (1) of the Act.[1]

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*),

[1] Since the court below did not disclose its reasons for refusing to enforce the Board's order we do not know upon what grounds the case was decided. We state the above question, as we believe it was the controlling basis for the decision. However, should there be other questions lurking in the record, we desire to preserve the right to urge our position thereon, as well as to urge that the failure to issue an opinion disclosing the grounds of decision was itself error.

and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 26-30.

STATEMENT

Upon the usual proceedings under Section 10 of the Act, as amended, the Board, on November 17, 1947, issued its findings of fact, conclusions of law and order (R. 33-68) which may be summarized as follows:[2]

A. *The Board's Findings and Conclusions.*—About January 1, 1946, while United Steel Workers of America, CIO, herein called the Union, was engaged in an attempt to organize the Company's employees, Assistant General Foreman Streetman informed one of the Company's old employees, Wilson, that he, Streetman, two of the foremen, and Whitworth, a part-time supervisor, were not supposed to know about the Union's organizing campaign; that they would permit it to "rock along until it got ripe, and then they would pluck it in the bud"; that they had "squashed" it on a previous occasion when the Union had attempted to organize the plant and that "they could squash it again" (R. 42, 45; B. A. 15-16).

By the early part of February, after the Union had achieved substantial success in its organizing campaign (R. 42, 48; B. A. 5, 9-10), the Company

[2] In the following statement, the record references preceding the semicolons are to the Board's findings; succeeding references are to the supporting evidence.

commenced its efforts to eliminate the Union as it had threatened to do. Anti-union petitions appeared almost simultaneously in all departments of the plant, most of them typed on the Company's old time sheets (R. 47-52; B. A. 17, 34-35, 38-39, 48-50, 51-56, 61-63, 70, 77, 83-84, 86). A majority of them bore the heading "We, the undersigned, do not want a Union" or "We do not want a CIO Union here" (R. 48-49; B. A. 105-118). These petitions were circulated during working hours over a period of three or four days (R. 49; B. A. 35, 48, 56, 63), and at least three of the Company's foremen assisted in their circulation. Thus, Foreman Camp requested one of his subordinates, employee Panell, to circulate one of the petitions for the purpose of "seeing who was against the Union" (R. 46-47; B. A. 34, 37). Panell protested because he feared that he might cause someone to lose his job, whereupon Camp assured him that no such loss of jobs would result and advised him to consult Assistant General Foreman Streetman for more information about the petitions (R. 47; B. A. 34). As Panell concluded his conversation with Foreman Camp, Foreman Elam approached him, handed him a blank sheet of paper and told him to see Streetman for instructions about what to do with the paper (*ibid.*). Panell then sought out Streetman for instructions and the latter explained that "the way they was doing it was going around and getting the names of those that didn't want the Union"

(R. 47; B. A. 34). Panell did not, however, solicit the employees' signatures because Streetman informed him that other men were already going through the factory for that purpose (R. 47; B. A. 35).

An employee, Holcombe, who refused to sign one of the petitions, was approached on the following morning by his foreman, Miles, who had theretofore made known his hostility to the Union,[3] and questioned concerning his union sympathies (R. 51; B. A. 39). When Holcombe expressed himself in favor of unionization, Miles announced that "he didn't want the damn CIO in there" and that "the day it came in was the day he would leave" (*ibid.*).

On February 15, the Company's president, Cannon, summoned the employees of the vault department to the conference room and outlined to them a plan for reducing their working hours from 48 to 40 hours a week while maintaining the same salary levels (R. 46; B. A. 20-21). He requested all employees in favor of the plan to raise their hands in approval (R. 46; B. A. 21). L. C. Kilgore, the Union's organizing chairman (R. 54; B. A. 16,

[3] About January 30, Foreman Miles had approached a union organizer not an employee of the Company as he was distributing leaflets to the employees outside of the plant and asked him in the presence of a number of employees "Why don't you go to work?" (R. 42; B. A. 7-8). When the organizer replied that he had just been mustered out of the Army where he had been working for the United States Government for the last two and a half years, Miles retorted with an obscene reply and characterization of the discharge paper which the organizer had offered to show him (R. 42-43; B. A. 8).

30), did not raise his hand (R. 46; B. A. 21). Acting Foreman Whitworth, under whom Kilgore worked, was sitting beside him and remarked, "Kilgore, you didn't raise your hand, did you?" (*ibid.*). Kilgore replied, "What difference does it make? The majority's going to rule anyway." (*ibid.*). A few days later while at work, Kilgore was approached by Whitworth and questioned about how he felt concerning the Union organizing the plant after having heard President Cannon's plans for the "new deal" (R. 46; B. A. 21-22). Kilgore replied that he did not intend to vote against a union coming in the plant (R. 46; B. A. 22). A few days later, on February 19, 1946, Kilgore was discharged (R. 56-57).

Henry Whitworth, who was responsible for Kilgore's discharge, became acting foreman of the vault department where Kilgore worked when Miles, the regular foreman, became ill on February 10 (R. 34, 44; B. A. 28, 38, 88-93, 100-102). Whitworth was one of the persons mentioned by Assistant General Foreman Streetman as having been responsible for defeating the Union when it attempted to organize the plant upon a previous occasion and who could do it again (*supra,* p. 3). Prior to being put in charge of the vault department, Whitworth had made several inquiries concerning whether certain employees were union members, had attended a union meeting, and had thereafter circulated one of the anti-union peti-

tions (R. 45-46, 50-51; B. A. 6, 39, 43-47, 70, 73, 81-83, 87-88).

Whitworth was well aware of Kilgore's union activities and sympathies (R. 54, 61-62; B. A. 6, 18-19, 22). Kilgore had been elected chairman of the Union's organizing committee at the January 11 union meeting and was present at the next meeting which Whitworth attended (R. 54; B. A. 30, 81.) He made no attempt to conceal his union sympathies, wearing his union button in the plant and soliciting members among fellow employees (R. 54; B. A. 15, 17-18, 22). He had expressed himself to fellow employees as a strong believer in the value of labor organizations (R. 54-55; B. A. 17-18, 22, 31). And as stated *supra*, pp. 5-6, when, during the height of the Union's organizing campaign, the Company announced a plan to decrease hours of work without a reduction in the employees' pay, he had refused to raise his hand in approval; Whitworth had not only commented upon this conduct at the time, but several days later had sought Kilgore out at his work to question him in regard to his position about the continued need for a Union in view of the Company's voluntary proposal to better the employees' working conditions.

About two days later, on February 19, Whitworth came to Kilgore and told him that his team mates on the "break," a stamping or pressing machine on which he worked, had been complaining about him all day and suggested that Kilgore quit his job (R. 55; B. A. 19, 22). Kilgore, however,

refused to quit and was permitted to return to his machine (R. 55; B. A. 22). Later in the day Whitworth called Kilgore aside and told him that the men with whom he worked were going to quit if Kilgore did not quit (R. 55-56; B. A. 22). Kilgore again refused to quit (R. 56; B. A. 23). Whitworth then undertook personally to supervise the work of Kilgore and his three team mates (R. 56; B. A. 29, 72, 94). One of the four vaults which they made while being thus supervised was imperfect (R. 56; B. A. 23, 29). Although there was no showing that Kilgore was responsible for the defect in the vault, Whitworth took Kilgore to the office, removing Kilgore's time card on the way (R. 56; B. A. 23). He reported to the general foreman, "Kilgore here, I don't know what the trouble is. He's always been on time, his work's been satisfactory up to today. Those three men on the * * * big break, has — says they're going to quit if he don't" (R. 56; B. A. 23). Kilgore was then discharged (R. 56-57; B. A. 23).[4] At the hearing, no evidence was introduced to show that any employee had in fact threatened to quit unless Kilgore was discharged (R. 61). Even Whitworth did not so testify, but contended rather that Kilgore was discharged because he did not perform

[4] The Company made no attempt to explain why, if Kilgore's work on the stamping machine was in fact unsatisfactory, it did not transfer him back to work on the shears where admittedly he had formerly performed his duties satisfactorily and where, at the time of Kilgore's discharge, a vacancy existed (R. 56, 62; B. A. 20, 24, 41).

his work properly (R. 60-61; B. A. 93-94). The evidence does not show that Kilgore's work was of such a character as to warrant his discharge (R. 57-61). Until the day of his discharge, no fault had ever been found with his work and he had never been told of any complaint regarding his work being made by fellow employees (R. 55; B. A. 22, 24, 28, 29, 94).

Under the circumstances, the Board refused to credit Whitworth's testimony regarding the reason for Kilgore's discharge and concluded that the true reason for his discharge was the Company's "desire to rid itself of the Union's most outspoken adherent, and thereby to discourage its employees in their efforts toward union organization" (R. 62). The Board found, therefore, that the company had discharged Kilgore in violation of Section 8 (3) and (1) of the Act.

The Board concluded also that the Company, by the activities of Foremen Camp, Elam and Streetman in attempting to induce employee Panell to circulate one of the anti-Union petitions, and the conduct of Foreman Miles and Acting Foreman Whitworth in questioning employees Holcombe and Kilgore about their positions in regard to the Union, had interfered with, restrained and coerced its employees in the exercise of the rights guaranteed them under Section 7 of the Act, in violation of Section 8 (1) (R. 34-35, 54).

B. *The Board's order and the proceedings in the court below.*—The Board ordered the Company to

cease and desist from engaging in the unfair labor practices found, to reinstate Kilgore with back pay, and to post appropriate notices (R. 35-38). On January 6, 1949, the Board filed in the court below a petition to enforce the Board's order (R. 1-6). The court, on April 14, 1949, without stating the reasons for its action, entered its opinion and judgment denying the Board's petition for enforcement (R. 80-81).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In not holding that the Board's findings are supported by substantial evidence.

2. In denying enforcement of the Board's order.

3. In failing to state its reasons for denying the Board's petition for enforcement.

REASONS FOR GRANTING THE WRIT

1. As the Statement indicates, and as we shall show (*infra*, p. 23), there is absolutely no lawful basis upon which the court below could have reversed the Board in this case. Nevertheless, this is not the type of case which, were it to be considered in isolation, the Board would normally regard as of sufficient public importance to warrant an application for a writ of certiorari to review the refusal of the court below to enforce the Board's order. But this is not an isolated case; the decision below is, rather, symptomatic of a

pattern of denial by the Court of Appeals for the Fifth Circuit of the rights accorded the National Labor Relations Board by Congress. This Court has said that "charges by public agencies constitutionally created—such as the Board—that their duly conferred jurisdiction has been invaded so that their statutory duties cannot be effectively fulfilled, raise questions of high importance." *National Labor Relations Board* v. *Waterman S. S. Corp.*, 309 U. S. 206, 209. And since the Board's complaint here is even broader than the "substantial evidence" question involved in *Waterman*, certiorari is deemed appropriate to review this decision as well as four other judgments of the court below, review of which is sought by petitions filed concurrently with this.

These applications are being made because the Fifth Circuit has denied enforcement of, or modified, Board orders in an inordinately large number of cases which have recently been before that court on petitions for enforcement of Board orders, and because this experience bodes ill for the large number of Board cases now pending in the area over which the court below has jurisdiction. Thus, in none of the seven contested Board orders before that court during the past year has enforcement in full been granted. And the five cases in which petitions for certiorari are being filed will in themselves show that in a substantial proportion of the cases in which the Fifth Circuit has reversed the

Board, the Court's action was plainly unwarranted as a matter of law.

During the two years following the amendment of the Act (August 22, 1947 to August 22, 1949), the Court of Appeals for the Fifth Circuit has enforced in full only three contested Board orders,[5] and has set aside, modified, or remanded Board orders in twelve cases. In five of those twelve cases, including *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 167 F. 2d 662, recently reversed unanimously by this Court in 337 U. S. 217, the Board's order was set aside *in toto*.[6] In six of the cases, the Board's order was enforced as modified,[7] the modifications in all but two instances being serious; the remaining case

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[5] *National Labor Relations Board* v. *Gate City Cotton Mills*, 167 F. 2d 647; *The Sturges Company* v. *National Labor Relations Board*, 166 F. 2d 142; *National Labor Relations Board* v. *Whittenberg*, 165 F. 2d 102.

[6] These include three of the cases in which petitions for writs of certiorari are being filed simultaneously herewith, to wit: the instant case, *National Labor Relations Board* v. *Atlanta Metallic Casket Co.*, 173 F. 2d 758; *Wilson & Co.* v. *National Labor Relations Board*, 173 F. 2d 979; and *National Labor Relations Board* v. *Massey Gin & Machine Works, Inc.*, 173 F. 2d 758; in each of which enforcement was denied without opinion; and *National Labor Relations Board* v. *Reynolds Corp.*, 168 F. 2d 877.

[7] These are *National Labor Relations Board* v. *Caroline Mills, Inc.*, 167 F. 2d 212; *National Labor Relations Board* v. *Sewell Mfg. Co.*, 172 F. 2d 459; *National Labor Relations Board* v. *Lovvorn*, 172 F. 2d 293; *National Labor Relations Board* v. *Port Gibson Veneer Co.*, 167 F. 2d 144, certiorari denied, 335 U.S. 819; *National Labor Relations Board* v. *Prigg*, 172 F. 2d 948; and *National Labor Relations Board* v. *Fulton Bag & Cotton Mills*, decided July 8, 1949 (24 L.R.R.M. 2281).

was remanded to the Board for the purpose of taking further evidence.[8]

In sharp contrast, during the same two-year period, contested Board orders were enforced in full in other courts of appeals in 38 of the 59 cases before them. A comparative chart showing the disposition of contested Board orders in each of the courts of appeals is set forth below:

	Enforced in Full	Set Aside	Modified	Remanded
1st Circuit	3	.....	.....	1
2nd Circuit	5	.....	.....	.....
3rd Circuit	2	.....	1	.....
4th Circuit	5	2	2	.....
5th Circuit	*3*	*5*	*6*	*1*
6th Circuit	10	5	2	.....
7th Circuit	6	5	.....	.....
8th Circuit	3	.....	.....	.....
9th Circuit	2	.....	.....	.....
10th Circuit	2	1	.....	.....
D. C.	.....	2	.....	.....

In no circuit other than the Fifth has enforcement of a Board order been denied without the court disclosing the reasons which impelled such action on its part. In three cases in which enforcement was denied by the Fifth Circuit during the period here under consideration—this case, and

[8] *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 172 F. 2d 974.

the *Wilson* and *Massey* cases in which concurrent petitions for writs of certiorari are being filed—Board orders were set aside without even a statement of the basis for decision.

Nor has any circuit other than the Fifth denied summary enforcement of a Board order where the respondent had filed no exceptions to the trial examiner's intermediate report and, hence, pursuant to Section 10 (e) of the Act, no issue as to the validity of the Board's order was open on review. Yet, in two of the cases in which the Board is now petitioning this Court for a writ of certiorari,[9] the court below denied enforcement even under those circumstances, and remanded the cases to the Board with directions to consider additional evidence concerning compliance.

As shown by the chart set forth above, during the last two years, a larger volume of Board orders has come before the court below for enforcement than before any other court of appeals except that for the Sixth Circuit. The percentage of such cases in the area over which the Fifth Circuit exercises jurisdiction wherein respondents refuse to comply with Board orders is rapidly increasing. The Litigation Docket for the Board's Division of Law shows that, as of August 31, 1949, 42 of the 129 Board orders which are pending in the Division of

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[9] *National Labor Relations Board* v. *Mexia Textile Mills*, decided June 3, 1949 (unreported) and *National Labor Relations Board* v. *Pool Mfg. Co.*, decided May 13, 1949 (24 L.R.R.M. 2147).

Law for enforcement involve unfair labor practices which occurred within the Fifth Circuit's jurisdiction. This represents 32 percent of all such orders.[10] Moreover, the large volume of unfair labor practice cases now pending in the Board's regional offices and before the Board in Washington in various stages, from the issuance of the complaint to efforts to obtain compliance with Board orders without the necessity of enforcement proceedings in court, indicates that, for a number of years hence, a large volume of cases will continue to come before the Court of Appeals for the Fifth Circuit in enforcement proceedings. Of the 422 cases thus pending, 79, or 19 percent, arose within the Fifth Circuit's territorial jurisdiction. Upon the basis of past experience, it is estimated that this will result in more than one-third of the Board's enforcement litigation during the coming year being handled by the Fifth Circuit, because a much larger percentage of Board cases pending in that territorial jurisdiction seems to result in court litigation than is true in other circuits.

Until the court below handed down its decisions in the five cases in which petitions for writs of certiorari are now being sought, the Board con-

[10] The Litigation Docket shows the following number of Board orders awaiting enforcement in the various circuits as of August 31, 1949: In the First Circuit, 3; Second Circuit, 10; Third Circuit, 8; Fourth Circuit, 5; Fifth Circuit, 42; Sixth Circuit, 26; Seventh Circuit, 5; Eighth Circuit, 4; Ninth Circuit, 16; Tenth Circuit, 6; and District of Columbia, 4.

sidered whether to ask this Court to review each successive adverse decision only in terms of the importance of that particular decision to the administration of the Act and the existence of important conflict between it and decisions of other courts of appeals or this Court. This approach led the Board to apply for a writ of certiorari in only one case within the last two years, i.e., *National Labor Relations Board* v. *Crompton-Highland Mills, supra.*

Now, however, the Board has become convinced that this approach has proven, and will continue to prove, inadequate to the task of securing enforcement of the Act in the court below. This is so in part because in most cases which come before the courts of appeals on petitions for enforcement of Board orders, the sole issue, as in the instant case and the *Wilson* case, is whether the Board's findings of fact are supported by substantial evidence on the record considered as a whole. A resolution of this issue depends upon the particular facts of each case and hence no question of general importance in the administration of the Act is presented. However, where, as here, a court of appeals not only repeatedly rules that the Board's findings are not supported by substantial evidence, but also denies enforcement in whole or in part to a large majority of all Board orders on various other grounds, sometimes, for no stated reason at all, a more generalized approach to the

Board's request that this Court review the rulings of the court below seems warranted.[11]

The Board does not insist that in all cases in which the court below denied enforcement in full of Board orders within the last two years, its action was clearly unwarranted. Neither does the Board contend that in all cases no substantial part of the Board's order has been enforced. Indeed, in at least two of the six cases in which the Board's order was modified, the Board does not consider the court's modification as seriously affecting its orders.[12] But the other four cases involved modi-

[11] The difficulty of enforcing the Act in the Fifth Circuit has been recently demonstrated anew in *National Labor Relations Board* v. *Corsicana Cotton Mills*, decided by the court below on August 16, 1949. In that case, the Board sought to have an employer held in contempt of a previously issued consent decree requiring the employer to bargain with the accredited representative of its employees. The court, although it was "not in any doubt that * * * respondent withheld recognition from the union as bargaining agent, as ordered by our decree, and caused a rupture of the bargaining negotiations," declined to hold the employer in civil contempt because, in the court's view, "such violation was not intended but has resulted from a mistaken view of * * * the law and not from a purpose to violate the law or our decree." This, it appears, is an error of precisely the same nature as that for which the court below was reversed by this Court in *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 191. Review of the *Corsicana* case, however, is not now being sought, since the court below declined to issue a final adjudication in the contempt proceeding until the parties report to it in November on the then current status of bargaining negotiations.

[12] Thus, in *National Labor Relations Board* v. *Prigg*, 172 F. 2d 948, involving violations of Section 8 (1), (3) and (5) of the Act, the court below sustained all of the Board's findings and enforced the Board's order except those provisions requiring reinstatement and back pay to six discriminatorily discharged employees; the court retained those

fications of varying degrees of seriousness, some practically emasculating the Board's order.[13] The

provisions of the order "for action after further hearings and action by the Board" since the Board, in its decision, had reserved the right to modify such provisions of the order "if made necessary by a change of conditions in the future." And in *National Labor Relations Board* v. *Lovvorn*, 172 F. 2d 293, involving violations of Section 8 (1) and (5) of the Act, the court sustained the Board's findings but amended that part of the order which required the employer to bargain by adding to the Board's bargaining order the following words, "until in appropriate proceedings under Section 9 (c) of the Act, as amended, the employees with the assistance of the Board and without coercion or interference from union or employer, shall have freely designated a new representative or have freely indicated that they no longer desire to be represented by the said union."

[13] Thus, *National Labor Relations Board* v. *Sewell Mfg. Co.*, 172 F. 2d 459, and *National Labor Relations Board* v. *Fulton Bag & Cotton Mills*, decided July 8, 1949, 24 L. R. R. M. 2281, each involved Board findings that the employer had violated Section 8 (1) and (3) of the Act. In each case, the court below sustained only those Board findings relating to violations of Section 8 (1) and refused to sustain the more important findings which related to discriminatory discharges, lay-offs, and refusals to reinstate employees, found by the Board to be in violation of Section 8 (3).

In *National Labor Relations Board* v. *Port Gibson Veneer Co.*, 167 F. 2d 144, employer petition for certiorari denied, 335 U. S. 819, involving Board findings that the employer had violated Section 8 (1) and (3) of the Act by interfering with its employees' organizational rights, by discriminatorily refusing to reinstate three of its employees who struck in protest against their employer's unlawful conduct, and by locking out 210 employees, the court refused to sustain the Board's findings and order in regard to the three employees who engaged in a strike but enforced the remainder of the Board's order.

And in *National Labor Relations Board* v. *Caroline Mills, Inc.*, 167 F. 2d 212, involving violations of Section 8 (1) and (3) of the Act, the court below enforced that part of the Board's order requiring the employer to reinstate one of the discriminatorily discharged employees but denied enforcement to that part of its order requiring reinstatement of another employee who, subsequent to his discriminatory discharge, had been given a part-time job by the employer from which he subsequently voluntarily resigned.

Board's complaint is not merely that the court below has imposed modifications of a different sort than those imposed on Board orders in other courts of appeals.[14] The revisory action of the Fifth Circuit

[14] In this group, for the sake of accuracy, we include among those cases classified *supra*, p. 13, as modified, *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571 (C. A. 6), involving the discharge of foremen because of their union activities. The court enforced the affirmative provisions of the Board's order requiring reinstatement and back-pay, but refused to enforce the cease and desist provisions of the order because, subsequent to the Board's order, the Act was amended, removing foremen from the protection of the Act; the Board did not oppose this modification. *National Labor Relations Board* v. *Mylan-Sparta Co., Inc.*, 166 F. 2d 485 (C. A. 6), involved Board findings that the employer had violated Section 8 (1) and (3) of the Act. The court sustained the findings relating to violations of Section 8 (1) and to three employees whose discharges violated Section 8 (3) but refused to sustain the important findings that the employer had discriminatorily discharged four other employees.

In *National Labor Relations Board* v. *Wytheville Knitting Mills*, 175 F. 2d 238 (C. A. 3), involving Board findings that the employer had violated Section 8 (1) and (3) of the Act, the court sustained only that part of the order relating to the Section 8 (1) violation. It refused to sustain that part which required the employer to reinstate with back pay two striking employees with whom the remainder of the employees, both union and non-union, had refused to work because of offensive language used by the two while they were on the picket lines. In *National Labor Relations Board* v. *Stowe Spinning Co.*, 165 F. 2d 609 (C. A. 4), reversed and remanded, 336 U. S. 226, involving Board findings that the employer had violated Section 8 (1) and (3) of the Act, the Court of Appeals for the Fourth Circuit enforced that part of the Board order based on its finding that Section 8 (3) had been violated but denied enforcement of that part of the order involving Board findings that the employer had unlawfully denied the use of a meeting hall for union meetings, in violation of Section 8 (1). In *Peoples Motor Express, Inc.* v. *National Labor Relations Board*, 165 F. 2d 903 (C. A. 4), involving Board findings that the employer had violated Section 8 (1), (3) and (5) of the Act, the court enforced all provisions of the Board's order except that pertaining to one of three employees found by the Board to have been discriminatorily discharged.

differs from that of other reviewing courts not only in its nature but in its frequency.

The Board can see no sound reason why, assuming substantially the same standards of review and approach are applied, one court of appeals should deny enforcement of Board orders in a much greater proportion of cases than other courts of appeals. The same trial examiners who hear cases and make the initial findings of fact and recommendations within the Fifth Circuit's territorial jurisdiction hear cases and make findings and recommendations in cases throughout the country, for the Board assigns cases to its trial examiners in rotation so far as practicable, as it is required to do under Section 11 of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001-1011). Moreover, the same Board Members who decide the cases which come before the Court of Appeals for the Fifth Circuit for review likewise decide the cases which come before all the other courts of appeals.

We realize, of course, that statistics in situations such as this are not absolute proof of the conclusion toward which they point. It is conceivable that in the two years following the 1947 amendment of the Act, the Board has happened to commit reversible error in most of the cases coming before the court below for review, while it did not commit reversible error in more than a small number of the similar cases coming before other circuits. But we do not believe that such extraordinary fortuity is the explanation. We believe, rather, that the

court's action results either from its failure to accept, or its erroneous concept of, the statutory scheme for court review of Board orders. An inkling of the approach taken by the court below is afforded by the opinion in *National Labor Relations Board* v. *Caroline Mills, Inc.*, 167 F. 2d 212, 213:

> This is another of those dreary reviews of Board proceedings presenting the question not whether the findings of fact made by the Board, as trier of the facts, on evidence presented by the Board, as prosecutor, in support of charges filed by the Board as complainant, have been fairly, impartially, and justly arrived at, but whether they are "supported by substantial evidence on the record considered as a whole." It presents the usual picture of supporting findings arrived at by a process of quite uniformly "crediting" testimony favorable to the charges and as uniformly "discrediting" testimony opposed.

See also, *National Labor Relations Board* v. *Fulton Bag & Cotton Mills*, decided July 8, 1949 (24 L. R. R. M. 2281). But the best and, perhaps, the only way to determine the accuracy of the Board's appraisal of the situation is for this Court to review the five cases in which writs of certiorari are now being sought.

These five cases are, we believe, appropriate vehicles for bringing to this Court's attention the special seriousness of the Board's enforcement problems in the court below. In this case and

the *Wilson* case, although the court did not state its reasons for refusing to enforce the Board's orders, there appears to be no issue which would have resulted in setting aside the entire order except whether there is substantial evidence supporting the Board's findings. In the *Massey Gin* case, a number of legal issues which are described in the Board's petition for a writ of certiorari in that case were presented, but the court below stated no reason for denying enforcement of the Board's order and the Board is without knowledge of the grounds upon which the court below acted. In the *Mexia* and *Pool* cases, in which the validity of the Board's orders had not even been contested, the court below granted employer petitions to adduce additional evidence and remanded the cases to the Board to take evidence and report whether there had been compliance with the Board's order and what effect, if any, compliance should have on the request for enforcement. In all of these cases, we contend that the court below clearly committed error.

On February 12, 1940, this Court in *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, admonished the court below not to substitute its own judgment for that of the Board on questions of fact. During the ensuing period a much larger percentage of Board orders received enforcement in that circuit.[15] It seems clear to the

[15] Between the *Waterman* decision on February 12, 1940, and August 22, 1947, the effective date of the amended Act,

Board that the court below once again requires correction by this Court if the statute is to be effectively administered in the large and important area covered by that court's jurisdiction.

2. As shown in the Statement, *supra*, pp. 3-9, the Board's findings of fact are clearly supported by substantial evidence on the record considered as a whole. The Board's order is the uniformly approved remedy for the unfair labor practices found and its appropriateness, if based upon findings supported by substantial evidence, was never in issue. The employer in the court below urged only that the Board's findings were not supported by substantial evidence. We are therefore convinced that the sole issue involved is the substantiality of the evidence. While it is possible, as we suggested in our petition for rehearing below (R. 82-83), that the court below believes that the scope of court review of Board findings has been changed by the amended Act, in this case there is clearly substantial evidence to support the Board's findings under any correct interpretation of the provision of that Act that "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive" (Section 10 (e)).[16] The court's un-

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the court below enforced in full 40 Board orders, denied enforcement of 9, modified 26, and remanded 2.

[16] That the scope of review under the Act, as amended, has not been materially changed, see *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U. S. 217, 220; *Eastern Coal Corp.* v. *National Labor Relations Board*,

explained denial of the Board's petition for enforcement of its order under the circumstances constitutes a serious impediment to the proper functioning of the Act. It has resulted in clear violations of the Act standing uncorrected.

3. We believe that the court below erred in failing to set forth the reasons for its denial of enforcement in the instant case. In the *Massey* case, where the court below likewise failed to disclose its grounds for decision, we are asking that the case be remanded for an explanatory opinion.

However, we urge the Court to take the instant case and decide it now on the merits, rather than remand it for an opinion. Whereas in the *Massey* case, a multiplicity of issues are presented resolution of which would impose an undue burden on this Court, unenlightened, as it is, by an opinion of the court below, the issue in the instant case is a narrow one. That being so, and since a remand in this and the *Wilson* case would be only partly responsive to the needs which have given rise to these unusual applications for certiorari, we deem immediate consideration of the merits by this Court to be of great importance to the effective administration of the Act. Only in that way can the whole problem of enforcement which the Board has encountered in the Fifth Circuit be met.

(C. A. 4), decided June 13, 1949 (24 L. R. R. M. 2210); *National Labor Relations Board* v. *Austin Co.*, 165 F. 2d 592, 595 (C. A. 7); *National Labor Relations Board* v. *Caroline Mills, Inc.*, 167 F. 2d 212, 213 (C. A. 5). Cf. *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 337 U. S. 656.

CONCLUSION

For the reasons stated above, we respectfully submit that this petition for a writ of certiorari should be granted, in association with those in the other four cases.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,
National Labor Relations Board.

OCTOBER 1949.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

* * * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provision of Section 9 (a).

* * * * *

SEC. 10. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If

either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript.

The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are as follows:

* * * * *

SEC. 10

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such

transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. * * *

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